IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

IN RE: 2011 REDISTRICTING CASES.

CASE NO. 4FA-11-2209CI

MEMORANDUM IN SUPPORT OF THE PETERSBURG PLAINTIFFS' MOTION FOR ADEQUATE TIMELINE AND PUBLIC HEARINGS ON THE FINAL REDISTRICTING PLAN

I. INTRODUCTION

In the 2012 elections, for the first time in Alaska's history, voters in Southeast Alaska were required to elect legislators under a districting scheme unanimously recognized by the Alaska Supreme Court justices as unconstitutional. Although the Alaska Redistricting Board ("Board") complied with the Supreme Court's remand order to create constitutional house districts for Southeast, the Court instead required the use of the unconstitutional districting of Southeast in the Amended Proclamation Plan in the 2012 elections. It did so in part because of objections raised to the Southeast districts in the alternative interim plan and the Court's apprehension that the objections would delay U.S. Department of Justice ("DOJ") preclearance of the interim plan under Section 5 of the Voting Rights Act of 1965 ("VRA") beyond 2012 deadlines. This history must not be repeated in 2014.

Accordingly, the City of Petersburg, Mark L. Jensen, and Nancy C. Strand ("Petersburg Plaintiffs"), through their Motion for Adequate Timeline and Public

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Hearings on the Final Redistricting Plan, seek an order from the Superior Court requiring the Board; (i) to adopt a schedule for completing a new redistricting plan that will assure ample time for judicial review before the 2014 state elections; (ii) to receive input on that plan at public hearings, as mandated by article VI, section 10 of the Alaska Constitution; and (iii) adopt a proclamation declaring a final plan on or before a specific date set by the this Court.

II. FACTUAL BACKGROUND

After this Court rejected the Board's Amended Proclamation Plan, the Board submitted a proposed interim plan to the Alaska Supreme Court on May 3, 2012.[1] Although the Board also requested review of this Court's decision that the Amended Proclamation Plan was unconstitutional, the Supreme Court first focused on the interim plan due to pending 2012 elections deadlines. *See In Re 2011 Redistricting Cases*, 294 P.3d 1032 (Alaska 2012).

On May 10, 2012, the Supreme Court ordered adoption of the Board's Amended Proclamation Plan as the interim plan, except that the Court remanded the plan to the Board for reformulation of the Southeast Alaska districts. The Court instructed the Board primarily to "design a plan focusing on compliance with the article VI, section 6 requirements of contiguity, compactness, and relative socioeconomic integration" for the Southeast districts. *Id.* at 1035. The Court also directed that:

[1] Given the lengthy litigation surrounding the 2010 redistricting process and the Superior Court's familiarity with this process, the Petersburg Plaintiffs refrain from a full recitation of the facts in this background. Instead, the Petersburg Plaintiffs provide only the details necessary to rule upon the motion at hand.

> [t]he reformulated plan should not be altered based on the Voting Rights Act (VRA) because there is no VRA justification for deviating from Alaska constitutional requirements in Southeast Alaska.

Id. at 1048.

On May 15, 2012, the Board submitted the reconfigured Southeast districts to the Alaska Supreme Court for review. While the Petersburg Plaintiffs did not object to the Board's submission, the Superior Court received and the Supreme Court noted a handful of apparently coordinated eleventh-hour objections from Southeast Alaska Native organizations. *See Objection of Chilkoot Indian Association's Objection to the Redistricting Board's Reconfiguration of Southeast Alaska Election Districts, Objections of Sealaska Corporation and Central Council Tlingit & Haida Indian Tribes of Alaska to the May 15, 2012 Reformulated Southeast Alaska Redistricting Plan, Objection of Haines Borough to Amended Proclamation House Districts,* and *Metlakatla Indian Community's Objection to the Redistricting Board's Reconfiguration of Southeast Alaska Election Districts.* Three of the five justices, apprehensive that these objections might impede timely U.S. Department of Justice ("DOJ") preclearance of the Board's interim plan before 2012 state election deadlines, ordered that the Board's Amended Proclamation Plan districting for Southeast be used in the interim plan for the 2012 elections. *Id.* at 1049. However, the Supreme Court also stated its intent to "ensure that districts that comply with the Alaska Constitution can receive timely review by the Department of Justice for use in subsequent elections." *Id.* at 1050. In essence, the Supreme Court made sacrifices in the validity of the Interim Plan to ensure that the Final Plan was well vetted.

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Having disposed of the issue of interim districting for the 2012 elections, on December 28, 2012 the Alaska Supreme Court affirmed the Superior Court's invalidation of the Amended Proclamation Plan, and ordered the Board to "draft a new plan based on strict adherence to the *Hickel* process." *Id.* at 1033. According to Senior Justice Matthews and Justice Fabe, the majority opinion "sends the redistricting process mandated as a result of the 2010 census back to ground zero." *Id.* at 1050.

On February 12, 2013, the Board met to address numerous issues, including a projected timeline for the completion of a final redistricting plan. During this meeting, the Board introduced a schedule that, among other things:

1) Noted that the Board had no constitutionally or statutorily imposed deadlines for adopting the final plan (*See* Exhibit A to Affidavit of Holly Wells, Transcript of February 15, 2013 Board Meeting at 53-54);

2) Noted the potential for seeking leave of the Court to use the Interim Plan for the 2014 elections if needed (*id.* at 54);

3) Suggested that the Board delay drafting a final plan until after the United States Supreme Court issued a decision in *Shelby County, Al v. Holder, Att'y Gen. et. al.*, No. 12-96 (November 9, 2012) regarding the validity of Section 5 of the Voting Rights Act (*See* Exhibit A to Affidavit of Holly Wells, Transcript of February 15, 2013 Board Meeting at 55-56); and

4) Declared public hearings unnecessary for the final plan (*id.* at 53).

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In response to the Board's Request for Clarification on other issues, the Riley Plaintiffs filed a request that, among other things, the Court also clarify that a time frame for the final plan must be adopted and that public hearings on that plan were constitutionally required.

The Alaska Supreme Court declined to address the Riley Plaintiffs' request, instead permitting any party to move for clarification on these issues from the Superior Court. On May 2, 2013, this Court instructed the parties to submit any motions regarding these two issues no later than May 15, 2013. The Petersburg Plaintiffs file this motion in response to that direction.

III. ARGUMENT

A. The Timeline Proposed by the Board in its February 12, 2013 Meeting Violates the Alaska Supreme Court's December 28, 2012 Order and Legislative Intent

1. Introduction

The State of Alaska, through its people, its legislature, and its courts, has repeatedly mandated the expeditious adoption of a final redistricting plan once that plan is publicly vetted, through constitutionally available public hearings and/or litigation. The Board's leisurely schedule for plan adoption and failure to provide for public hearings on plans proposed by the Board undermine the clear intent of the Alaska Constitution. These decisions are particularly prejudicial to the Petersburg Plaintiffs and other Southeast Alaska voters, who were subject to unconstitutionally configured districts under the Interim Plan during the 2012 elections and will be

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subject to these districts again in 2014 if a constitutional final plan is not timely adopted.

The tentative timeline proposed by the Board makes it almost impossible for it to comply with the Supreme Court's Order requiring adoption of a final plan for the 2014 elections. It also ignores the legislative intent underlying the constitutional amendments which were designed in part to put an end to the historically drawn out redistricting process in Alaska.

2. The Timeline Introduced by the Board Fails to Comply with the Alaska Supreme Court's Order to Adopt a Final Plan for the 2014 Elections

On December 28, 2012, the Alaska Supreme Court ordered the Board to "draft a new plan for the 2014 elections." *In Re 2011 Redistricting Cases*, 294 P.3d 1033 (Alaska 2012). Despite this Order, the Board introduced a rough timeline on February 12, 2013, that would make adoption of a final plan by that date highly unlikely. Under the Board's proposed timeline, the Board does not even begin to draft a final plan until August and "very easily" September to accommodate the fishing season for the Board members. *See* Exhibit A to Affidavit of H. Wells, 56:4; 57:15-21.

Assuming that the Board initiates the drafting of its plan on September 1, 2013, it will have less than seven months to fully vet the draft before the deadline for appointing the Election Board for the 2014 elections. *See* AS 15.10.120. It took the Board and the courts more than double that amount of time to complete the full process on the initial redistricting plan. This is especially troublesome as the Board complied with the constitutional deadlines in drafting the initial plan. If the Board

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could not meet the 2012 elections deadlines while adhering to the ambitious timeframe in the constitution, there is no hope for the adoption of a plan before the 2014 elections where the Board far exceeds the constitutionally mandated timing. Assuming that adoption of the final plan takes the same amount of time as the initial process, the final plan should be complete by September, 2014 – after the August 26 primary election, approximately five months after the election board appointment deadline, and only two months before the general election. *See* "Consequences of Board's Proposed Timeline on 2014 Elections," Exhibit B to Affidavit of Holly Wells. Given the failure of the proposed timeline to provide for sufficient judicial review and the Alaska Supreme Court's December Order, the Board has an obligation to create a timeline that actually makes adoption of the plan for the 2014 elections feasible.

3. The Board Unreasonably Relies Upon *Shelby County, Al v. Holder, Att'y Gen. et. al.*, No. 12-96 to Justify Delaying Adoption of its Final Redistricting Plan

One reason the Board's projected timeline falls so short is due to its decision to delay adopting a final plan pending a decision by the U.S. Supreme Court in *Shelby County, AL*. In deciding that case, the U.S. Supreme Court may determine whether Section 5 of the VRA is constitutional. However, the Board's decision to stall the redistricting process to await that decision is illogical and directly contradicts the best interest of the Alaska voters.

There is no way of predicting when the *Shelby County, AL* decision will be issued. *See* Exhibit A to Affidavit of Holly Wells. As a result, the proper course of action at this time is to move forward with preparation of a final plan under the laws currently in effect. Further, the Board already would have provided for the

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contingency that the U.S. Supreme Court will declare Section 5 of the VRA unconstitutional prior to the 2014 elections by having prepared the plan complying with the Alaska Constitution as the first step of the *Hickel* process that the Alaska Supreme Court has prescribed.

Much of the work required to prepare a VRA-compliant plan already has been accomplished. The Board's VRA expert's previous determination of the benchmark requirements for a plan to comply with the VRA should not change. There is no reason why she could not proceed to identify any deficiency in minority effective house and senate districts under the Board's *Hickel* plan even before any ruling in *Shelby County, AL* was handed down. *See* Corrected Order Dissenting Opinions to May 22, 2012 Order, dissenting Op. by Justices Winfree and Stowers, Order No. 78 (June 19, 2012), 2-3.

Even if the Superior Court determines that the Board has reason to delay the adoption of a final plan in light of the pending U.S. Supreme Court decision in *Shelby County, AL*, for fishing seasons or any other reason, the Board's timeline ignores viable options for moving the process forward even while the final plan as a whole is on hold. The Supreme Court has already directed the Board that the Southeast Districts should not be altered based upon the Voting Rights Act. *See infra*, 2. Additionally, the Southeast districts are not impacted by reformatting of districts outside that region as the 2010 census population of Southeast supports exactly four house districts. Thus, the Board could redistrict Southeast in compliance with the Alaska Supreme Court's December Order and hold hearings on its reconfigured Southeast districts while awaiting direction on the remainder of the final plan. This

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would permit the Board to address any objections and mitigate future litigation at least for the Southeast districts before finalizing the plan.

4. The Board's Timeline Violates Legislative and Voter Intent for Expediency

The Board's lackadaisical approach to the drafting of a final plan also directly conflicts with the legislature's and the voters' clear intent to require an expedited redistricting process. Prior to the adoption of article VI, section 10 of the Alaska Constitution, the State of Alaska suffered drawn out and unpredictable redistricting processes. After the 1980 census, it took the governor's office seven years to adopt a final redistricting plan due to protracted litigation. After the 1990 and 1970 censuses, final plans were not approved until over three years after the initial plan was adopted. Gordon S. Harrison, Comment, *The Aftermath of in Re 2001 Redistricting Cases: The Need for a New Constitutional Scheme for Legislative Redistricting in Alaska*, 23 Alaska L. Rev. 51, 57-58 (2006).

In 1998, article VI, sections 10 and 11 of the Alaska Constitution were enacted, requiring that a draft redistricting plan be approved within thirty days after receipt of the census information and a final plan submitted to the Superior Court within sixty days. Similarly, the courts were expressly required to expedite redistricting matters and give them priority over all other pending matters. The legislature and the state's voters no longer were willing to let the redistricting process languish. In 2000, the first redistricting after the constitutional amendments, the 2002 elections took place under an approved final redistricting plan, despite challenges to the plan before the Superior Court and the Supreme Court and amendments to that plan. *In re 2001 Redistricting Cases*, 44 P.3d 1089 (Alaska 2002); *see also*

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Gordon S. Harrison, Comment, *The Aftermath of in Re 2001 Redistricting Cases: The Need for a New Constitutional Scheme for Legislative Redistricting in Alaska*, 23 Alaska L. Rev. 51, 60-70 (2006).

The Board's timeline would make the constitutional amendments on the expediency of the redistricting process futile. The legislature's and the voters' unmistakable goal, which the court has itself recognized, is an expedited redistricting process. *See, e.g., In Re 2001 Redistricting Cases*, 44 P.3d 141, 147 (Alaska 2002). Such a process would be completely undermined if the expediency required in adopting an initial plan was ignored in adopting an amendment to that plan. Yet the Board pays only minimal attention to the looming 2014 elections and, instead, its attorney advised them that there are no requirements for any timeline at all:

> other than getting the plan in place for the next election, which technically, I guess, is [sic] we could go back to the court and say we couldn't get it done, use the interim plan again.

Exhibit A to Affidavit of H. Wells, at 53:20-54:4.

Additionally, the Board's failure to adopt a timeline that allows for litigation challenging its plan ignores history and reality. Absolutely every redistricting plan adopted in Alaska has been successfully challenged in the courts. *See Egan v. Hammond*, 502 P.2d 856 (Alaska 1972); *Carpenter v. Hammond*, 667 P.2d 1204 (Alaska 1983); *Hickel v. Southeast* Conference, 846 P.2d 38 (Alaska 1992); *In re 2001 Redistricting,* 44 P.3d 141 (Alaska 2002); *In Re 2001 Redistricting Cases,* 44 P.3d 1089 (Alaska 2002). Consequently, any proposed timeline for the Board to complete a plan must provide time for full judicial review of the plan by both the Superior Court and the Supreme Court.

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5. The Inadequacy of the Interim Plan Requires Adoption of a Final Plan Before the 2014 Elections

While the above arguments emphasize the insufficiency of the Board's timeline, the need for a realistic timeline is magnified by the injustice to voters in Southeast Alaska of conducting another cycle of elections under the current Interim Plan. The Petersburg Plaintiff's implore the court to protect Southeast Alaska voters from any further subjection to an admittedly unlawful plan simply because the Board fails to schedule adequate time to complete redistricting.

The timeline proposed by the Board ensures that the Alaska Supreme Court will be, once again, forced to choose between the continued application of the unlawful Interim Plan or election extensions. It would be inexcusable to again place the Supreme Court in this position with regard to the 2014 elections.

B. Public Hearings Are Required as a Matter of Law

1. Introduction

The Board is expressly required by the Alaska Constitution to hold public hearings on a proposed redistricting plan. The Board's refusal to comply with this constitutional mandate will undoubtedly have a negative impact on the quality of the final plan and lead to litigation on the constitutionality of the process for adopting that plan. Even if the Board's refusal to hold public hearings somehow survived scrutiny by the courts, the litigation stemming from the lack of such hearings would delay adoption of a final plan and, especially given the unrealistic schedule currently proposed by the Board, most definitely result in failure to implement the plan by the 2014 elections.

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2. Failure to Hold Public Hearings on the Final Plan would Violate Article VI, Section 10 of the Alaska Constitution

The Board suggested during its February 12, 2013 meeting that public hearings are only required when adopting its initial proclamation plan. *See* Exhibit A to Affidavit of Holly Wells, at 53:15-19. This narrow reading of the Alaska Constitution is wholly without merit. Article VI, section 10 of the Alaska Constitution states, in relevant part: "The Board shall hold public hearings on the proposed plan, or, if no single proposed plan is agreed on, *on all plans proposed by the Board*." (Emphasis added). This constitutional mandate does not distinguish between plans that the Board initially proposes, and plans that it proposes after a remand from judicial review.

The Alaska Supreme Court has unequivocally ordered the Board to draft a new redistricting plan. In its December 28, 2012 Order, the Alaska Supreme Court instructed the Board to "draft a *new* plan." *In Re 2011 Redistricting Cases*, 294 P.3d 1032 (Alaska 2012) (emphasis added). The Court later clarified that "a *new Hickel* plan is required." Alaska Supreme Court Order (No. 14721, Apr. 24, 2013). As a result of the Court's clear direction, the required new plan will likely include reformulated districts, and these districts will implicate the interests of new groups. Additionally, these districts may raise new concerns and objections from current parties. Foreclosing the rights of these individuals and entities to express their objections to the final plan would directly undermine the intrinsic value of public hearings and the reasons such hearings are constitutionally mandated.

The Petersburg Plaintiffs are particularly concerned with the lack of public hearings in Southeast Alaska as those districts will undoubtedly be reformulated. As

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discussed above, the Court noted the numerous objections raised to the Southeast Alaska districts proposed in an interim plan that was rejected by the Court due to time constraints. The Alaska Supreme Court chose to adopt the Amended Proclamation Plan as the Interim Plan so that the final plan had adequate time for full review by the DOJ. It would be nonsensical to now permit the Board to adopt a plan that was not subject to adequate review by the public. Due in part to the objections raised in the past to Southeast Alaska districts proposed by the Board, the Petersburg Plaintiffs anticipate commentary from the public that will be beneficial in drafting Southeast Alaska districts that are lawful under the Alaska Constitution and merit preclearance by the DOJ. These beneficial voices must be heard, under both the constitution and basic principles of equity.

3. Conduct of Public Hearings Avoids Litigation on the Final Plan and Results in a Plan More Likely to be Lawful

Beyond the constitutional obligation for public hearings, the final plan is far more likely to be lawful and timely adopted if the public's comments and concerns are heard. A well vetted final plan will likely survive any critical review by the DOJ and individuals and entities are far less likely to bring suit against the Board if the concerns of those individuals and entities have been heard and addressed prior to adoption of the final plan. Additionally, the individuals and groups may actually raise concerns that the Board overlooked and offer solutions for these concerns. Consequently, public hearings are not just a constitutional requirement, they are also essential to providing expedient and conclusive redistricting.

IV. CONCLUSION

For all of the reasons stated above, the Petersburg Plaintiffs respectfully request that public hearings be held by the Board on the Final Plan and that the Board adopt a revised timeline that would ensure that the Final Plan would be in place prior to the 2014 elections.

DATED this 15th day of May 2013.

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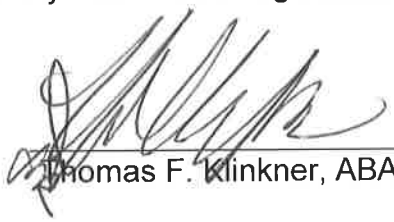
By: 
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 15th day of May, 2013 at 3:00 p.m. a true and correct copy of the foregoing was served via electronic delivery on the following:

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